IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	CASE NO. 1:16CV425 Winston-Salem, North Carolina June 16, 2016 4:40 p.m.

TRANSCRIPT OF THE **TELEPHONE CONFERENCE/MOTION HEARING**
BEFORE THE HONORABLE THOMAS D. SCHROEDER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenotype reporter.
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P R O C E E D I N G S

THE COURT: Okay. We are on the record now in 1:16CV425, United States of America versus State of North Carolina, et al.

I understand there are a number of folks on the phone. Let me go ahead and have everyone note your appearance. Let me start with the Plaintiff, United States. Who is appearing today?

MR. RAND: Good afternoon, Judge Schroeder. This is Ripley Rand with the U.S. Attorney's Office, and Corey Stoughton from the Civil Rights Division of the Department of Justice is also on the call, as well as I believe some other folks.

MS. STOUGHTON: Your Honor, this is Corey Stoughton. I'm here with Lori Kisch, Torey Cummings, Taryn Null, and Dwayne Bensing from the Civil Rights Division.

THE COURT: All right. Welcome. How about for the UNC Defendants, UNC and the Board of Governors?

MR. FRANCISCO: This is Noel Francisco of Jones Day for UNC and the UNC Board of Governors. Also appearing in the case with me are James Burnham of Jones Day and Carolyn Pratt of the University of North Carolina General Counsel's Office. Also on the phone with us is Vivek Suri of Jones Day.

THE COURT: And how about for the State of North Carolina and the Governor, Governor McCrory?

MR. BOWERS: Good afternoon, Your Honor. This is Butch Bowers. It is good to be with you again. I am here on behalf of the Governor of the state and Secretary Perry, along with Bob Stevens, Lindsey Wakely, and Jonathan Harris. All three are from the Office of the Governor.

THE COURT: All right. And do I have the -- I guess it's the intervenors -- proposed intervenors at this time?

MR. DUNCAN: Yes, Your Honor, good afternoon. This is Kyle Duncan, and I'm joined by my colleague, Gene Schaerr, and also our local counsel, Robert Potter. We represent the proposed intervenors in this action, who are President Pro Tem Phil Berger and the House Speaker, Tim Moore.

THE COURT: All right. Is there anybody else on the phone that has not made an introduction?

All right. Hearing none, thank you for setting time aside on short notice. Four or five days ago, maybe six days ago, I think we -- I guess it looks like seven days ago, June 10th, there was a filing of a motion as a joint motion to enjoin the automatic suspension of funds received under the Violence Against Women Act, Document 37 in the case.

I wanted to get you on the phone today because even though it's presented to the Court as a consented-to motion, I think there are some serious questions about whether the Court has the authority to do what the parties are asking the Court to do, and it looks like there is a deadline that's running. I

wanted to give everybody enough heads-up about that.

Simply put, it appears that under the statute that whenever the attorney general files a civil action, which would include the present action, that the Government must suspend payments within 45 days of the filing of the action and that the only exception to that is if the Court grants such preliminary relief that may be available by law.

The cases in the Fourth Circuit and around the country indicate that the standard to be applied is the standard for a preliminary injunction. This presents an unusual question in this case because there's no doubt that the representation is that funds used here by the State of North Carolina are for the extremely important services involving programs that protect some of the most vulnerable in our society, including these rape prevention programs.

What I am concerned about, though, is that what's presented to me is, in essence, a consent agreement of the parties that the Court should suspend the funds because that's in the best public interest. My concern is that the statute seems to clearly require the suspension of funds as a provision of the statute that reflects the judgment of Congress, and I have serious questions as to whether this Court has the authority to stop that process merely by the entry of an order because the parties agree to it in the case. I have a serious question of whether that would override the will of Congress.

It seems, from what I can tell from my research, that Congress drafted these laws to give the Federal Government certain powers and to put certain pressures on other parties who receive federal funds, and a condition of receipt seems to be compliance with other important federal laws.

So I noticed in the briefing there was a statement on page 6 of the brief that the likelihood-of-success factor is, quote, of dubious value in light of the joint nature of the motion. I'm not sure I can quite agree with that because, based on what I understand the law to be, I would have to make findings equivalent to those for preliminary relief under the four-part preliminary injunction test, which would include a finding that the Defendants can show likelihood of success on the merits. It's not entirely clear to me, and I presume otherwise that the Government is not conceding success on the merits by filing this motion.

So it's postured in an unusual sense, and I am not sure I'm in a position that I would even be able to sign a consent order under these circumstances, certainly given the present posture. The parties have not indicated to me my authority to do that, and I have a concern that if I were simply to do that because nobody disagrees with it, that that would be overriding the will of Congress.

So in the absence of some other showing, it would appear that I am not going to be in a position to grant the

relief the parties have moved for, and I wanted to give you the opportunity to address that if you think there is some other basis on which I could grant relief and to give you the opportunity to brief that. Time seems to be of the essence.

I do note that this has been an issue that's been out there for a while. I would have presumed that the parties were aware of this earlier, but it does seem to be a significant question and problem in the case; and if you read some of the authorities, including the ones that the parties have cited, I think the joint request has some significant issues.

Another concern I have is the showing of irreparable harm under the case law. As important as these programs are, and they appear to be extremely important, I don't have any record before me that the elimination of funding for whatever period of time would constitute irreparable harm. As a general rule, the elimination of funding is not irreparable harm, and there are many cases to that effect, including the ones the parties have cited. That leaves open the possibility of whether the programs themselves would have to shut down if the funding were ended, and I don't know -- I don't have any facts about what the funding situation is. I don't know if it's a block grant for a period of time. I don't know when the next funding would be. So I'm simply without information to make any finding as to irreparable harm.

The last issue that concerns me is there's no doubt

the public interest would be served by the continuation of these programs, but there is also a public interest alleged by the Government, and that is the elimination of the H.B. 2 law and the public interest served by the elimination of the law, and there is zero discussion of that in the balancing of the public interest here in the materials.

So I have significant questions about the posture of the motion and my underlying authority to act, and I will be happy to give you all more opportunity to brief it, if you wish; but based on my research to date, I am not sure that you will find anything that shows that I have the authority. If that is the case, then the parties need to be prepared for whatever consequences might flow from this, and that's why I called you together today so you had a little bit of a heads-up.

I would be happy to hear from any of you all if you have some reaction to that.

MS. STOUGHTON: Your Honor, this is Corey Stoughton from the Department of Justice, Civil Rights Division. I want to thank you for the heads-up and for the opportunity to address these issues.

I will start by saying that there is no question that Congress' intent to give the attorney general the tool of automatic suspension should be taken into account and weighed in the Court's decision.

THE COURT REPORTER: I'm having trouble hearing her, Your Honor.

THE COURT: Hold on just a minute, please. We are having a little audio problem here. If you have a volume on your phone, too, if you could turn it up, that would be helpful.

MS. STOUGHTON: Is it better now?

THE COURT: Let's try that. Thank you.

MS. STOUGHTON: Your Honor, I was just beginning by saying that I think there's no question that Congress' intent to give the attorney general the tool of automatic suspension to be a factor in the Court's analysis, but, respectfully, I think the Court's authority to undertake this is in the statute itself because Congress didn't merely include the automatic suspension provision, but expressly included a process by which the Court would have the opportunity to weigh various factors that should come into play in considering whether that was an appropriate exercise of power in a particular instance and come to a different conclusion, which I think reflects not only Congress' clear intent that automatic suspension should not happen in every case, but also a clear grant of authority to the Court to consider the factors that should come into play in considering whether it should.

So I think in terms of the direct problem and I think the most clear problems raised of authority, that that

authority is there in the statute itself.

I think, you know, it's -- obviously, it's clear, as you said, that Congress drafted those laws to give certain powers of enforcement to the Federal Government, but I think it's also equally clear that Congress left and only leaves it to the Executive Branch the discretion to determine how to exercise and execute those powers.

In this case, the United States has taken a clear position that, in the first instance, it is preferrable and we hope adequate to accomplish the public interest in enforcing civil rights laws by obtaining an injunction that will bring the funding recipients, the VAWA funding recipients, into compliance with VAWA without jeopardizing important interests that are served by the funding. In that circumstance, where the United States has made that judgment, I think it is consistent with Congressional intent that, you know, while Congress gave that power -- again, it both clearly gave the executive some power to make decisions about which amongst its enforcement tools are the right tool for the job and also clearly gave the Court authority to consider that judgment and exercise its own discretion on whether to grant preliminary relief from the automatic suspension provision.

I could address the other points, but I thought maybe I would step down and give any other party an opportunity to be heard before I turn to the other issues raised around

irreparable harm and the public interest.

THE COURT: Does anybody else want to be heard as to the authority? I note that the statute says that once the attorney general files a civil action alleging a pattern or practice and neither party has, after such filing, been granted such preliminary relief with regard to the suspension or payment of funds as may otherwise be available by law, then the funds shall be suspended, and it's mandatory language.

MR. FRANCISCO: Your Honor, this is Noel Francisco for the University of North Carolina and the Board of Governors.

I would just echo the Department of Justice's position that it does -- this statute does, at least in our view, appear on its face to give the Court the authority to award the preliminary relief. As the Court noted, the standard is the standard for granting of preliminary injunction, but my understanding of that standard in the Fourth Circuit is that -- and also I think that, Your Honor, given that authority and the standard that applies, and it's an equitable standard, we believe that gives the Court sufficient authority to enter the relief that --

THE COURT: How do I make a finding on likelihood of success on the merits? I have no briefing on that so far in this case.

MR. FRANCISCO: My understanding of the preliminary

injunction standard is that typically the Court can grant a preliminary injunction based on essentially a sliding scale set of factors. You don't need to make a finding on every one of the factors. In this particular case, it would certainly seem odd to reach the likelihood of success on the merits when the other factors are the ones that, in our view, are what strongly support the Government's position to exercise its discretion not to withdraw the funds.

THE COURT: Anybody else wish to be heard?

MS. STOUGHTON: I don't mean to be dominating the conversation, but a couple of things in addition, if I may.

First, again with respect to the authority, as you pointed out, the language of the statute clearly is phrased in mandatory terms, but I would urge the Court to see that language and read it in the context of the entire statute, including the provision granting the Court authority to issue preliminary relief and to see that mandatory language as a default, that it gives way, should the parties invoke the process that's put into the statute, for seeking relief from that provision and should the Court agree that under the applicable standard that relief is warranted.

With regard to that standard, you know, I agree, Your Honor. I understand that it is definitely the case the United States does not concede and will not concede that the Defendants have a likelihood of success on the merits of the

legal claim about H.B. 2's compliance with federal law, but in this context what the briefing is meant to communicate is that the logical application of the likelihood-of-success standard is kind of a different beast than it might usually be, and that's because in this case the relief that the United States is seeking is not the suspension of funds in the first instance or in the pleadings.

And so because of that, when a Court -- you know, for example, in the cases from the '70s and '80s, when the Court considered these questions in the context of the Phase Three fact, and it was an opposed and contested motion, the argument that was being made was that the funds should not be suspended because at the end of the day the defendants in those cases would prevail or were likely to prevail and, therefore, would keep their federal funding because the cutoff for federal funding was at issue.

In this case, that is not, at this stage, at issue; and what the relief that the United States, the Plaintiffs, are seeking is merely -- I mean, not merely. I don't mean to diminish it, but it is not a funding cutoff. It is an injunction to come into compliance with federal law. In that sense, the question of success is not really about success on the merits, but the success in keeping that funding and the logic of kind of ensuring -- which I'm sure Congress had in mind, the continuity of funding, if you are going to keep the

funding, at the end of the day is important, and I think that interest remains the case here.

And so although I recognize this, I'm also going to recognize and acknowledge that we don't have authority for citing this, that the reason for that, of course, is because, frankly, this hasn't been done before, and so the Court is considering this in first impression; and so that was our effort to kind of translate the meaning and import of the likelihood-of-success standard into this novel context.

I did also want to address the question of irreparable harm, and, you know, we had taken the position in the pleadings that the question of irreparable harm would be evident from the important purposes served by the funding and the natural implication that interruptions in funding would be disruptive toward the important goals of those programs; but I will say if the Court is unsatisfied with that, I would ask for the opportunity to provide some additional factual evidence pertaining to the specific, as the Court seems to urge, purposes that the funding is put towards, and we could obtain perhaps a declaration or some kind of statement from -- I mean, on our side, I'm sure we could obtain it from the OVW, the Office on Violence Against Women --

THE COURT: Hold on just a minute. We're having difficulty hearing when you go a little bit fast. So I am going to have to ask you, Ms. Stoughton, if you don't mind just

to try to speak a little more slowly because we are having audio issues here. Thank you.

MS. STOUGHTON: I apologize. I was just stating our request to -- if the Court was willing to consider it, to supplement the record on the question of irreparable harm, and it may be that some of the other parties to the other motion might want to do that as well.

THE COURT: Does anybody else wish to be heard this afternoon?

Hearing none, I would be happy to give you additional time to brief it. That's the precise reason I wanted to get you on the phone today because I entertain serious concerns about the relief requested. I don't doubt the motivation. I'm doubting my authority. I can't act just because the parties agree to something, particularly when Congress has reached a determination as to how something should be done, and the statute to me seems to be pretty clear. In fact, the regulations implementing the statute make clear that the standard for preliminary relief under the statute is the standard for a preliminary injunction. In order to obtain a preliminary injunction in the Fourth Circuit, you have to show the likelihood of success on the merits, among other factors.

So if you want to brief it some more, I would be happy to have you brief the various issues you think are important, but I am concerned that I have the authority to

enter the requested relief. If you have any example where any court has ever granted such relief, I would very much like to see that. I would be surprised if there were any because I think Congress wrote the statute, as far as I can tell, to give the Government tremendous leverage, and that's why there's a mandatory directive about suspending funds, which encourages folks to work issues out; and once the Government decides to file a civil action, then it kicks in the machinery of the statute.

I understand that the United States has tremendous discretion to exercise. A lot of the discretion to exercise, of course, is in whether to bring a case; but once it's brought, my understanding is that the Government enjoys this tremendous leverage under the statute, and unless -- and not only enjoys it, but Congress has demanded that it be used, and I need some more indication from the parties as to my authority to rule otherwise even with the parties' agreement. So I would suggest you focus on the Fourth Circuit standard for preliminary injunction whether there is, in fact, a need to show likelihood of success on the merits. It's my current understanding that that would need to be shown.

I'll be happy to entertain any more briefing and any evidence on the irreparable harm point and the funding issue and any other issue the parties want to address. If I'm persuaded that there's grounds to enter it, I will enter the

order. I am not opposed to it by any means, but I'm concerned, based on all my independent research and what the parties cited to me, which was not very much, that everybody's assuming something that seems to be contrary to the plain language of the statute.

So if you have any case law where injunctive relief was granted in the Fourth Circuit without any showing of likelihood of success on the merits or without any finding as to that, then, as well, I would like to see that.

I don't know where this will leave things if, for some reason, I am ultimately not persuaded. I want you all to at least have it on your radar. It seems that this issue arises because of the Violence Against Women Act claim here. I don't know if that leaves -- it may require procedural responses from the parties. The options are all available to the parties, however they want to do it, but the 45 days is running. I think it expires next Thursday, and as I said, I'm concerned that I don't have the authority to enter this.

So I would suggest -- if you want to brief additional matters, you are welcome to brief it jointly or separately, but I would suggest you have something filed by close of business on Monday, and I would be happy to consider it; and if there is a need for some kind of hearing, I would be happy to do that.

It's an important issue, but it may be that if I don't -- if I'm not persuaded and if you conclude that the

authority may not be as clear as you had hoped it to be, then I think you need to start making contingency plans as to how you are going to deal with this issue. I have no idea based on this record how significant the funding is and what the ramifications would be, but you all certainly need to put that on your radar. Either additional funds need to be found somewhere else or -- you know, you have a myriad of options of dealing with it, but I certainly wanted you all not to be surprised if something like that were to happen.

So I will look for whatever you file by the end of the day on Monday; and if you believe we need to have some type of hearing, you're welcome to put a request in for that, and I'll be happy to try to convene everybody again after that and before the deadline.

Any other questions or anything further from anyone? I'm not sure, Ms. Stoughton, I am yet persuaded as to your interpretation of the statute. It seems to be pretty straightforward and require the elimination of funding unless there is a grant of preliminary relief. I don't know what other escape valve there is from the statute. If you have any authority for that, I would be very interested in seeing it. I need to know what my options are rather than "just because the parties have agreed to it" because that doesn't seem to fit, at least as I see it, yet with the statute.

All right. Thank you all very much. I look forward

to whatever you can provide to me by close of business on Monday. Thank you.

(END OF PROCEEDINGS AT 5:09 P.M.)

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

CERTIFICATE OF REPORTER

I, Briana L. Nesbit, Official Court Reporter, certify that the foregoing transcript is a true and correct transcript of the proceedings in the above-entitled matter.

Dated this 17th day of June 2016.

Briana L. Nesbit, RPR
Official Court Reporter